No. 11747

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. WALLACE and E. B. LANDRY, a copartnership doing business as FULLERTON MANUFACTURING COMPANY,

Appellants,

vs.

WORLD FIRE AND MARINE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

BENJAMIN J. GOODMAN

810 Wm. Fox Building

608 South Hill Street

Los Angeles 14, Calif.

For Appellee:

HINDMAN & DAVIS

607 South Hill Street

Los Angeles 14, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the Southern District of California
Central Division

No. 5814-BH

L. WALLACE and E. B. LANDRY, a copartnership, doing business as FULLERTON MANUFACTURING CO.,

Plaintiffs,

vs.

WORLD FIRE AND MARINE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation,

Defendant.

COMPLAINT ON CONTRACT

Plaintiffs, for Claim for Relief, Allege:

I.

That at all times herein mentioned plaintiffs were partners doing business under the fictitious name of Fullerton Manufacturing Co. That the plaintiffs were and are citizens of the State of California.

II.

That at all times mentioned herein the defendant was and now is a corporation organized under and by virtue of the laws of the State of Connecticut and was and now is a citizen of the State of Connecticut. [2]

III.

That the defendant was at all times herein mentioned writing insurance under and by virtue of the laws of the State of California pertaining to insurance companies.

IV.

That the amount in controversy herein, exclusive of interest and costs, is $13,798.50, and is in excess of $3000.

V.

That the jurisdiction of this Court is based upon the diversity of citizenship of the parties hereto and the amount in controversy, exclusive of interest and costs, being in excess of $3000.

VI.

That on or about the 31st day of December, 1945, for valuable consideration, the defendant issued a fire insurance policy on the California standard form, with a provisional reporting endorsement thereon, in which it insured the property of the plaintiffs in an amount not to exceed $15,000.

VII.

That on or about the 14th day of February, 1946, and while said policy of insurance hereinabove mentioned was in full force and effect, a fire occurred on the premises of the plaintiffs resulting in a loss in the amount of $27,253.18.

VIII.

That said policy of insurance provided as follows:

"'Value Reporting Clause.'

(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each loca-

tion, all as of the last [3] day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

(B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein.

" 'Full Reporting Clause.' Liability under this policy shall not in any case exceed that proportion of any loss hereunder (meaning the loss at the location involved after deducting the liability of specific insurance, if any) which the last value reported to this company prior to the loss, less the amount of reported specific insurance, if any, at the location where the loss occurs, bears to the actual cash value of the property above described, less the amount of specific insurance, if any, actually in force at that location at the time of such report. Liability for loss hereunder occurring at any new location where, since filing the last report, the insured may have property as above described (except as provided in 'Value Reporting Clause,' paragraph 8) shall be apportioned in a like manner, except that the proportion used shall be the relation that the values at all locations reported prior to the loss, less the amount of re-

ported specific insurance, if any, bear to the actual cash value of the property above described at all locations, less the amount of specific insurance, if any, actually in [4] force at the time of such report. However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss."

IX.

That at the time of the happening of said fire plaintiffs had not reported to the defendant the actual cash value of the property on hand on the last day of January, 1946, but, within the 30-day grace period allowed under the value reporting clause, plaintiffs advised the defendant company that the cash value of the merchandise on hand amounted to $29,625.20, and that the loss to their property amounted to $27,253.18.

X.

That under the terms and conditions of said policy of insurance the defendant became liable to plaintiffs in the proportion of $27,253.18/29,625.20 of $15,000, or $13,798.50.

XI.

That said policy of insurance further provided as follows:

"Ascertainment of amount of loss. This company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified amendments have been

requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or [5] properties set forth in the preliminary proof or amendments thereto."

XII.

That on or about the 16th day of August, 1946 plaintiffs duly filed with the defendant a verified preliminary proof of loss in which the plaintiffs set forth that the cash value of the merchandise on hand amounted to $29,625.20; that the loss and damage amounted to $27,253.18; and the loss claimed under the policy provisions was $13,798.50; to which said preliminary proof of loss the defendant company did not in writing disagree with the amount of the loss so claimed by the plaintiffs.

XIII.

That the plaintiffs have demanded of the defendant the sum of $13,798.50 but the defendant has failed and refused to pay said sum of $13,798.50.

XIV.

That there is due, owing, and payable to plaintiffs from defendant the sum of $13,798.50, together with interest thereon at the rate of 7 per cent per annum from the 14th day of February, 1946.

Wherefore, plaintiffs pray judgment against the defendant in the amount of $13,798.50, together with interest thereon at the rate of 7 per cent per annum from the 14th day of February, 1946; for costs herein expended; and for such other and further relief as to the court may seem proper.

GEORGE PENNEY
Attorney for Plaintiffs [6]

[Verified.]

[Endorsed]: Filed Sep. 27, 1946. [7]

[Title of District Court and Cause]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon George Penney, plaintiff's attorney, whose address is 939 Rowan Building, Los Angeles 13, Calif., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court] EDMUND L. SMITH
Clerk of Court

By Edward F. Drew
Deputy Clerk

Date: 9/27/46.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[Stamped]: Received Oct. 1, 1946. U. S. Marshal's Office, San Francisco, Calif. Civil 27218. [8]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 3rd day of October, 1946, I received the within summons and complaint and served the same on World Fire and Marine Insurance Company of Hartford, Connecticut, by serving Mr. J. Andrus as General Adjuster at San Francisco, California, on the 3rd day of October, 1946.

GEORGE VICE
United States Marshal

By Herbert R. Cole
Deputy United States Marshal

Marshal's Fees

Travel	$ .30
Service	2.00
	2.30

* * * * * * * * *

[Endorsed]: Filed Oct. 5, 1946. [9]

[Title of District Court and Cause]

ANSWER

Comes now defendant and for Answer to Plaintiffs' Complaint:

I.

As to the allegations contained in Paragraph VI of Plaintiffs' Complaint, defendant admits the allegations except that defendant denies it insured the property of plaintiffs in an amount not exceeding $15,000.00 but in and to an amount not to exceed limits as provided therein.

II.

As to the allegations contained in Paragraph VIII of Plaintiffs' Complaint, defendant admits that said policy of insurance provided among other conditions as alleged in Paragraph VIII. [10]

III.

As to the allegations contained in Paragraph X of said Complaint, defendant denies said allegations and each and every allegation therein contained and denies that defendant became liable to plaintiffs in the sum of $13,798.50 or in any sum at all.

IV.

As to the allegations contained in Paragraph XII of Plaintiffs' Complaint, defendant admits the same except that defendant denies that the loss claimed under the policy provisions was $13,798.50 or any other sum at all.

V.

As to the allegations contained in Paragraph XIV of Plaintiffs' Complaint, defendant denies that there is now or was at the time of the commencement of the foregoing entitled action, or at any other time, or at all, due or owing or payable to plaintiffs from defendant the sum of $13,798.50 with interest, as alleged, or any other sum at all.

Further Pleading and as a Further and First Defense to Plaintiffs' Complaint Pro Tanto, Defendant Alleges:

I.

That on the 31st day of December, 1945, defendant issued to plaintiffs, its policy of fire insurance by the terms of which it insured plaintiffs, from December 31st, 1945 to December 31st, 1946, against all direct loss or damage by fire, except as therein provided, to an amount not to exceed limits as provided therein.

II.

That said policy was in the form known as "California Standard Form Fire Insurance Policy" as provided for by the Insurance Code, State of California, and to which was attached and made a part thereof "Provisional Reporting Policy Form No. 1." a copy of which "Provisional Reporting Policy Form No. 1." is hereto attached marked "Exhibit A", and made a part of this Answer as though fully set [11] forth herein.

III.

That said policy contained, among other provisions, the conditions alleged in Paragraph VIII of Plaintiffs' Com-

plaint and particularly provided, among other conditions, as follows, to-wit:

"'Value Reporting Clause.'

(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

(B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein.

"'Full Reporting Clause.' Liability under this policy shall not in any case exceed that proportion of any loss hereunder (meaning the loss at the location involved after deducting the liability of specific insurance, if any), which the last value reported to this company prior to the loss, less the amount of reported specific insurance, if any, at the location where the loss occurs, bears to the actual cash value of the property above [12] described, less the

amount of specific insurance, if any, actually in force at that location at the time of such report. Liability for loss hereunder occurring at any new location where, since filing the last report, the insured may have property as above described (except as provided in 'Value Reporting Clause,' paragraph 8) shall be apportioned in a like manner, except that the proportion used shall be the relation that the values at all locations reported prior to the loss, less the amount of reported specific insurance, if any, bear to the actual cash value of the property above described at all locations, less the amount of specific insurance, if any, actually in force at the time of such report. However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss."

IV.

That on the 14th day of February, 1946, the property at the location specifically described in said policy, to wit: "345 E. Santa Fe, Fullerton, California" was damaged by fire and plaintiffs and defendant agreed that the amount of loss of said property was in the sum of $27,253.18, and that the actual cash value of said property at said location was at the time of said fire and on January 31st, 1946, in the sum of $29,625.20.

V.

That the last value of said property reported to defendant company, prior to the loss, was in the sum of $2,000.00, which said report was made in writing to defendant company on January 3rd, 1946, purported to

report the actual cash value of the property insured at the location of 345 East Santa Fe, Fullerton, California, as of the [13] 31st day of December, 1945. That contrary to said report of $2,000.00 value at said location at said date, the actual cash value of the property insured at said location on the 31st day of December, 1945, was in the sum of $28,140.72, and defendant, if liable to plaintiffs at all, became liable under the terms of said policy for no greater proportion of plaintiffs' loss of $27,253.18, than the sum of $2,000.00 bears to the sum of $28,140.72.

Further Pleading and as a Second, Further, and Separate Defense to Plaintiffs' Complaint, Defendant Alleges:

I.

Repeats and by reference thereto, makes a part hereof and as though fully set forth herein, each and every allegation and reference in Paragraphs I and II of Defendant's Further and First Separate Defense, Pro Tanta.

II.

That said policy was in renewal of Policy Number 013121, issued by defendant to plaintiffs on the 31st day of December, 1944, and insuring plaintiffs against loss by fire as therein provided from December 31st, 1944 to December 31st, 1945, and was in the form and under the same terms and conditions as provided in said Policy Number 013121.

III.

That each and both of said policies contained the conditions set forth in Exhibit A, attached to and made a part of this Answer, and by reference made a part thereof and more particularly, the conditions alleged and set

forth in Paragraph III of Defendant's Further and First Separate Defense, Pro Tanto, which is herein referred to and made a part thereof and fully set forth herein.

IV.

That in each and both of said policies were contained the following provisions, provided for by the statutory policy of the State of California, to wit: [14]

> "'Matters Avoiding Policy.' This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof; or, (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

V.

That plaintiffs concealed and misrepresented material facts and circumstances concerning the insurance and the subject thereof in that although it was agreed by each and both of said policies that it was a condition of said policies that the insured should report to the company, this defendant, on the last day of each month of the policy term, the exact location of all property covered thereunder the actual cash value of said property at each location and the amount of specific insurance in force at each location, all as to the last day of that month, the plaintiffs, knowingly and wilfully, concealed from defendant the true actual cash value of the property located at 345 East Santa Fe, Fullerton, California, and misrepre-

sented the actual cash value of such property at such location in the following manner, to-wit:

"That plaintiffs, on and as of the 31st day of January, 1945, reported to defendant that the actual cash value at said location to be $5,000.00 when in truth and fact, said actual cash value at said location was in the sum of $19,856.00; that plaintiffs, on and as of the 28th day of February, 1945, reported to defendant that the actual cash value at said location to be $6,000.00 when in truth and fact, said actual cash value at said location was in the sum of $21,535.00; that plaintiffs, on and as of the 31st day of March, 1945, reported to defendant that the actual cash value at said location to be $7,000.00 [15] when in truth and fact, the actual cash value at said location was in the sum of $23,214.00; that plaintiffs, on and as of the 30th day of April, 1945, reported to defendant that the actual cash value at said location to be $8,000.00 when in truth and fact, the actual cash value at said location was in the sum of $24,820.00; that plaintiffs, on and as of the 31st day of May, 1945, reported to defendant that the actual cash value at said location to be $4,000.00 when in truth and fact, the actual cash value at said location was in the sum of $25,331.00; that plaintiffs, on and as of the 30th day of June, 1945, reported to defendant that the actual cash value at said location to be $4,000.00 when in truth and fact, the actual cash value at said location was in the sum of $25,842.00; that plaintiffs, on and as of the 31st day of July, 1945, reported to defendant that the actual cash value at said location to be $4,000.00 when in truth and fact, the actual cash value at said location

was in the sum of $26,353.00; that plaintiffs, on and as of the 31st day of August, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact, the actual cash value at said location was in the sum of $26,864.00; that plaintiffs, on and as of the 30th day of September, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact the actual cash value at said location was in the sum of $27,375.00; that plaintiffs, on and as of the 31st day of October, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact, the actual cash value at said location was in the sum of $27,886.00; that plaintiffs, on and as [16] of the 30th day of November, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact, the actual cash value at said location was in the sum of $28,338.33; that plaintiffs reported to defendant on the 3rd day of January, 1946, that the actual cash value of such property was, as of December 31st, 1945, the sum of $2,000.00, when in truth and in fact, such actual cash value was, as of December 31st, 1945, in the sum of $28,140.72."

Wherefore, defendant prays that plaintiffs take nothing by their complaint and that defendant go hence and have and recover its costs and disbursements herein.

HINDMAN & DAVIS
By E. Eugene Davis
Attorneys for Defendant
607 South Hill Street
Los Angeles 14, California [17]

(EXHIBIT A)

Standard Forms Bureau Form 446 (April 1942)

PROVISIONAL REPORTING POLICY FORM NO. 1. (MONTHLY AVERAGE)

This Policy Insures
L. WALLACE and E. V. LANDRY
doing business as FULLERTON MFG. CO.

Loss, if any, to be adjusted with the Insured named herein and payable to Assured named herein.

1. On merchandise of every description (except as hereinafter excluded) consisting principally of oil well tools manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, all being the property of insured or sold but not delivered or removed; and (Provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or on commission or consignment, or left for storage or repairs, but loss thereon shall be adjusted with and payable to the insured named in this policy; all while contained in any building, shed or structure, or on the premises, and in or on cars and vehicles while within 300 feet of said premises, and also while in, on or under sidewalks, platforms, alleyways and open space, provided such property be located within 25 feet thereof, within the limits of the State of California.

2. "Provisional Amount Clause." The amount of insurance provided for hereunder is provisional and is the

amount on which the deposit premium is based, it being the intent of this insurance to insure hereunder the actual cash value of the property described herein subject to the limits of liability and provisions for other insurance hereinafter provided.

3. "Limit of Liability." This Policy Being for the Provisional Amount of $....., Being .....% of the Total Contributing Insurance, Liability of This Company Is Limited to the Same Percentage of Any Loss and in No Event to Exceed the Same Percentage of Each of the Following Limits, but No Insurance Attaches Under Any One or More of the Following Limits Unless a Definite Amount Is Specified as a Limit and Inserted in the Blank Immediately Opposite the Location Item:

Item Number	Limit of Liability for all Contributing Insurance	Location Street Number and City
1.	$15,000.00	at 345 E. Santa Fe, Fullerton, California
2.	$.....	at .....
3.	$.....	at .....
4.	$.....	at .....
5.	$.....	at .....
6.	$.....	at .....
7.	$.....	at .....
8.	$.....	at .....
9.	$.....	at .....
10.	$ 3,000.00	at any other location within the above named geographical limits where the insured may have property as above described, subject to the conditions of the "Exclusion Clause", Paragraph No. 4, and of the "Value Reporting Clause", Paragraph No. 8.

4. "Exclusion Clause." This Policy Does Not Cover

(A) Motor Vehicles, Property in Transit, Property at or in Fairs or Expositions, or Growing Crops;

(B) At Any Location, Which Was Not Included in the Last Statement of Values Received by This Company Prior to Loss, Provided the Insured Had Property as Herein Described at Risk at Such Location as of the Date for Which Such Statement Was Made as Provided in the "Value Reporting Clause", Paragraph 8.

5. "Contributing Insurance Clause." Permission Is Granted for Other Insurance Written Upon the Same Plan, Terms, Conditions, and Provisions as Those Contained in the Form Attached to This Policy, i. e., Insurance Written Under This Provisional Reporting Form. The Insurance Under This Policy in Accordance With Its Printed Conditions or Riders, Shall Contribute Only With Other Insurance as Herein Above Defined, Against Any Peril Insured by This Policy.

6. "Specific Insurance." Insurance Other Than Described in the "Contributing Insurance Clause", Paragraph 5, Shall Be Known as Specific Insurance for Which Permission Is Hereby Granted. However, in the Computation of the Final Premium It Shall Not Be Permissible to Deduct or Credit Such Specific Insurance Against the Values Shown in the Monthly Reports, Except When

(A) It Has Been Necessary to Procure Such Insurance to Protect Values in Excess of the Limits of Liability of This Policy, or

(B) It Has Been Disclosed by Written Endorsement Hereon Showing Location, Expiration and Amount.

7. "Excess Clause." This Policy Does Not Attach to or Become Insurance Against Any Peril Upon Property Herein Described Which at the Time of Any Loss Is Insured by "Specific Insurance" as Defined in Paragraph 6, Until the Liability of Such "Specific Insurance" Has Been Exhausted, and Then Shall Cover Only Such Loss or Damage as May Exceed the Amount Due From Such "Specific Insurance" (Including the Amount Otherwise Due From Invalid Insurance Had Same Been Valid, and Including Also the Amount Due From Any Uncollectible Insurance) After Application of Any Contribution, Coinsurance, Average, Distribution, or Other Similar Clauses Contained in Policies of Such "Specific Insurance" Affecting the Amount Due Thereunder, Not, However, Exceeding Limits as Set Forth Herein. Extended Coverage Endorsement 201 PR ATTD

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 4 801476 of the World Fire and Marine Insurance Co. Agency at Los Angeles,
Name of Company
California. Dated December 31, 1945.

/s/ S. WEISBART
Agent

Trade Mark
[Crest]
Reg. U. S. Pat. Off.
446
April 1942

For Other Provisions See Reverse Side of This Rider [18]

Provisions Referred to in and Made Part of This Rider (No. 446)

8. "Value Reporting Clause."

(A) It Is a Condition of This Policy That the Insured Shall Report to This Company on the Last Day of Each Month of the Policy Term the Exact Location of All Property Covered Hereunder, the Actual Cash Value of Such Property at Each Location and the Amount of Specific Insurance in Force at Each Location, All as of the Last Day of That Month. However, A Grace Period of Thirty (30) Days Shall Be Allowed for Compilation and Submission of Such Reports to This Company.

(B) If at the Time of Any Loss, the Insured Has Failed to File With This Company, Reports of Values as Above Required, This Policy, Subject Otherwise to All Its Terms and Conditions, Shall Cover Only at the Locations and for Not More Than the Amounts Included in the Last Report of Values Filed Prior to the Loss; and Further, if Such Delinquent Report Is the First Report of Values as Required to Be Filed, This Policy Shall Cover Only at the Locations Specifically Named Herein.

9. "Full Reporting Clause." Liability Under This Policy Shall Not in Any Case Exceed That Proportion of

Any Loss Hereunder (Meaning the Loss at the Location Involved After Deducting the Liability of Specific Insurance, if Any) Which the Last Value Reported to This Company prior to the Loss, Less the Amount of Reported Specific Insurance, if Any, at the Location Where the Loss Occurs, Bears to the Actual Cash Value of the Property Above Described, Less the Amount of Specific Insurance, if Any, Actually in Force at That Location at the Time of Such Report. Liability for Loss Hereunder Occurring at Any New Location Where, Since Filing the Last Report, the Insured May Have Property as Above Described (Except as Provided in "Value Reporting Clause", Paragraph 8) Shall Be Apportioned in a Like Manner, Except That the Proportion Used Shall Be the Relation That the Values at All Locations Reported Prior to the Loss, Less the Amount of Reported Specific Insurance, if Any, Bear to the Actual Cash Value of the Property Above Described at All Locations, Less the Amount of Specific Insurance, if Any, Actually in Force at the Time of Such Report. However, This Company Shall Not Be Liable Hereunder for a Greater Proportion of Such Loss at Any Location Than the Limit of Liability Herein Specified for That Location Bears to the Actual Cash Value of the Property Described at That Location at the Time of Loss.

10. "Premium Adjustment Clause." The premium named in the policy is provisional only. The actual premium consideration for the liability assumed hereunder shall be determined, at the expiration of this policy, by application of the following formula:

After Deducting the Amount of Specific Insurance, if Any, (Not Exceeding, However, the Amount of Value

Reported) at Each Location, an Average of the Total Remaining Values Reported at Each Location (but Not in Excess of the Limit of Liability Established Herein) Shall Be Made, and if the Premium on Such Average Values at the Rate Applying at Each Location Herein Provided Exceeds the Provisional Premium, the Insured Shall Pay to the Insurer an Additional Premium for Such Excess; and, if Such Premium Is Less Than the Provisional Premium, the Insurer Shall Refund to the Insured Any Excess Paid. If This Policy Is Written for a Term of More Than One Year, an Adjustment of Both the Premium Earned and the Amount of Deposit Premium Shall Be Made Annually as Herein Provided.

11. "Retained Premium Clause." It Is a Further Condition of This Policy, Anything to the Contrary Notwithstanding, That the Final Adjusted Premium as Provided in the "Premium Adjustment Clause", Paragraph 10, Shall in No Event Be Less Than $100.00 Under This Policy.

12. "Premium Payment in Case of Loss Clause." It Is a Condition of This Policy That, in Case of Loss Occurring Hereunder, the Premium Applicable to the Amount of Loss Payment Shall Be Earned for the Term of the Contract; Therefore, the Insured Shall Pay This Company an Additional Premium at Pro Rata of the Rate Applicable Thereto for the Unexpired Term of This Policy on the Amount of the Loss Paid, and Said Premium May Be Deducted From the Payment of Said Loss.

13. "Reinstatement of Loss Clause." It is a condition of this policy that, in case of loss occurring hereunder, the amount of such loss shall be automatically reinstated after

its occurrence and this insurance shall then cover for the amount provided for hereunder.

14. "Verification of Values." This Company or its duly appointed representative, shall be permitted at all reasonable times during the term of this policy, or within a year after its expiration, to inspect the property covered hereunder and to examine the insured's books, records and such policies as relate to any property covered hereunder. This inspection and/or examination shall not waive or in any manner affect any of the terms or conditions of this policy.

15. This policy attaches and expires at any location at noon, meaning thereby noon standard time at such location.

16. "Subrogation Waiver." It is understood and agreed that any release from liability in a written contract entered into, prior to loss hereunder, by the insured with any person, firm, corporation or municipality, shall in no way affect this policy or the rights of the insured to recover hereunder.

17. "No Control Clause." This policy shall not be affected by failure of the insured to comply with any of the warranties or conditions endorsed hereon, in any portion of the premises over which the insured has no control.

18. "Permits." Permission granted to make alterations or repairs to the above described building(s) without limit of time and to build additions, and if in contact therewith, this policy shall cover in same under its respective items; permission granted to cease operations or shutdown for not to exceed sixty (60) days at any one time, subject to the conditions of the watchman clause, if any,

made a part of this policy; permission also granted to work at any and all times, and for such use of the premises as is usual and incidental in the business, as conducted therein, and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

19. "Lightning Clause." (This Clause Void as to Cyclone, Tornado or Windstorm Insurance.) This Policy Shall Cover Any Direct Loss or Damage by Lightning (Meaning Thereby the Commonly Accepted Use of the Term "Lightning" and No Case to Include Loss or Damage by Cyclone, Tornado or Windstorm) Not Exceeding the Sum Insured nor the Interest of the Insured in the Property, and Subject in all Other Respects to the Terms and Conditions of This Policy. Provided, However, That the Liability of This Company for Any Direct Loss or Damage by Lightning Shall Not Exceed the Liability That Would Have Been Incurred Hereunder if Said Loss or Damage Was Caused by Fire, Whether or Not Other Insurance on the Property Be Against Direct Loss by Lightning.

20. "Electrical Exemption Clause." If Dynamos, Wiring, Lamps, Motors, Switches or Other Electrical Appliances or Devices Are Insured by This Policy, This Insurance Shall Not Cover Any Immediate Loss or Damage to Dynamos, Exciters, Lamps, Motors, Switches, or Any Other Apparatus for Generating, Utilizing, Testing, Regulating or Distributing Electricity, Caused Directly by Electric Currents Therein, Whether Artificial or Natural, Including Lightning.

[Endorsed]: Filed Nov. 25, 1946. [19]

[Title of District Court and Cause]

AGREED STATEMENT OF FACTS

The respective parties, through their attorneys, stipulate, subject to proper objection as to relevancy and materiality, to the following facts:

I.

That L. Wallace and E. B. Landry are now and were at all times a copartnership doing business under the name of Fullerton Manufacturing Co., with its place of business at 345 East Santa Fe Avenue, Fullerton, California.

II.

That the defendant World Fire and Marine Insurance Company was and now is a corporation organized under and by virtue of the laws of the State of Connecticut and authorized to write fire insurance in [20] the State of California.

III.

That on or about the 31st day of December, 1945, the defendant executed and delivered to plaintiffs its California Standard Form Fire Insurance Policy No. 4801476. The original of said policy is hereto attached, marked "Exhibit A," and offered in evidence by plaintiffs.

IV.

That on or about the 14th day of February, 1946, a fire occurred at the premises described in said policy as 345 East Santa Fe Street, Fullerton, California.

V.

That the actual cash value of the property described in said policy at said location on said 14th day of February, 1946, was in the sum of $29,625.20, and the actual loss and damage to said property at said location by said fire was in the sum of $27,253.18.

VI.

That the plaintiffs had reported to defendant, in writing, on January 3, 1946, that the actual cash value of the property described at said location on December 31, 1945, was in the sum of $2000.00, whereas, in fact, the said property at said location at said time was of the value of $28,140.72.

VII.

That plaintiffs made no further statements or declarations of value to defendant until on or about the 26th day of February, 1946, when plaintiffs orally reported to defendant that the actual cash value of said property at the time of the fire was $29,625.20, and on the 29th day of March, 1946, in writing, reported the actual cash value of said property to have been, as of January 31, 1946, $29,000.00, and as of February 13, 1946, $29,000.00.

VIII.

That prior to December 31, 1945, defendant's policy [21] No. 013121 was in full force and effect. Said policy is offered as Defendant's "Exhibit 1."

IX.

That commencing on or about the 31st day of January, 1945, plaintiffs reported to defendant, in writing, what purported to be the actual cash value of the property de-

scribed in said policy as located at 345 East Santa Fe Street, Fullerton, California, as follows:

"That plaintiffs, on and as of the 31st day of January, 1945, reported to defendant that the actual cash value at said location to be $5,000.00, when in truth and fact, said actual cash value at said location was in the sum of $19,856.00; that plaintiffs, on and as of the 28th day of February, 1945, reported to defendant that the actual cash value at said location to be $6,000.00 when in truth and fact, said actual cash value at said location was in the sum of $21,-535.00; that plaintiffs, on and as of the 31st day of March, 1945, reported to defendant that the actual cash value at said location to be $7,000.00 when in truth and fact, the actual cash value at said location was in the sum of $23,214.00; that plaintiffs, on and as of the 30th day of April, 1945, reported to defendant that the actual cash value at said location to be $8,000.00 when in truth and fact, the actual cash value at said location was in the sum of $24,820.00; that plaintiffs, on and as of the 31st day of May, 1945, reported to defendant that the actual cash value at said location to be $4,000.00 when in truth and fact, the actual cash value at said location was in the sum of $25,331.00; that plaintiffs, on and as of the 30th day of June, 1945, reported to defendant that the actual cash value at said location to be $4,000.00 when in truth and fact, the actual cash value at said location was in the sum of $25,842.00; that plaintiffs, on and as [22] of the 31st day of July, 1945, reported to defendant that the actual cash value at said location to be $4,000.00 when in truth and fact, the actual cash value at said

location was in the sum of $26,353.00; that plaintiffs, on and as of the 31st day of August, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact, the actual cash value at said location was in the sum of $26,864.00; that plaintiffs, on and as of the 30th day of September, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact the actual cash value at said location was in the sum of $27,375.00; that plaintiffs, on and as of the 31st day of October, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact, the actual cash value at said location was in the sum of $27,886.00; that plaintiffs, on and as of the 30th day of November, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact, the actual cash value at said location was in the sum of $28,338.33; that plaintiffs reported to defendant on the 3d day of January, 1946, that the actual cash value of such property was, as of December 31, 1945, the sum of $2,000.00, when in truth and in fact, such actual cash value was, as of December 31, 1945, in the sum of $28,140.72."

Dated: January 6, 1947.

GEORGE PENNEY
Attorney for Plaintiffs

W. W. HINDMAN
E. EUGENE DAVIS
By E. E. D.
Attorneys for Defendant

[Endorsed]: Filed Jan. 6, 1947. [23]

[Title of District Court and Cause]

OPINION

George Penney, Esq., 939 Rowan Building, Los Angeles 13, California, Attorney for Plaintiffs.

Hindman & Davis, Esqs., 607 South Hill Street, Los Angeles 14, California, Attorneys for Defendant.

This is an action for the recovery of a fire loss occurring under a "provisional reporting policy" issued by the defendant insurance company, covering a stock of merchandise of fluctuating value. The policy was for a term of one year commencing at noon on December 31, 1945. It succeeded an almost identical policy. The fire occurred February 14, 1946. [24]

This case was submitted to the Court on an agreed statement of facts. The dispute between the parties revolves around an interpretation of this type of policy.

The first policy was taken out in December, 1944, for the provisional amount of Twenty Thousand Dollars ($20,000.00), and a premium of One Hundred Ninety-two Dollars ($192.00) was paid. Before the effective date, the provisional amount was reduced to Fifteen Thousand Dollars ($15,000.00), and Forty-eight Dollars ($48.00) of the premium was returned. The limit of liability stated was Thirty Thousand Dollars ($30,000.00). During 1945, plaintiffs reported an average value of only Four Thousand Dollars ($4,000.00), although the true value averaged Twenty-five Thousand Four Hundred and Sixty-three Dollars ($25,463.00). At the end of the year, the total premium due at ninety-six cents per One Hundred Dollars ($100.00) insured was only Thirty-eight Dollars and Forty Cents ($38.40), on the basis

of the values reported by plaintiffs, so all of the deposit premium in excess of One Hundred Dollars ($100.00) was returned to them.

In December, 1945, the new policy was executed at the same rate. The provisional amount was Four Thousand Four Hundred Dollars ($4,400.00). The limit of liability was set at Fifteen Thousand Dollars ($15,000.00). The policy was in all other respects identical in terms with the first policy, except that the provisional premium paid was only One Hundred Dollars ($100.00), instead of One Hundred and Forty-four Dollars ($144.00). The policy covered the insured property from noon, December 31, 1945, until noon, December 31, 1946.

On January 3, 1946, the plaintiffs reported that the property insured was worth Two Thousand Dollars ($2,000.00) as of December 31, 1945. The actual value at that time was Twenty-eight Thousand One Hundred and Forty Dollars ($28,140.00). On February 14, 1946, a fire occurred on the insured premises causing a loss of Twenty-seven Thousand Two Hundred and Fifty-three Dollars ($27,253.00). On February 26, 1946, plaintiffs [25] reported that the true value at the time of the fire was Twenty-nine Thousand Six Hundred and Twenty-five Dollars ($29,625.00). On March 29, 1946, they reported that the property was worth Twenty-nine Thousand Dollars ($29,000.00) on January 31, 1946, and Twenty-nine Thousand Dollars ($29,000.00) on February 13, 1946, the day before the fire. On August 16, 1946, they filed a proof of loss with the defendant, claiming Thirteen Thousand Seven Hundred and Ninety-eight Dollars and Fifty Cents ($13,798.50), as their recovery under the policy. Defendant admitted the amount of the

loss but denied that any recovery was due. Plaintiffs sued for the above amount, plus 7% interest from the date of the fire.

The premium due under this policy is subject to variation with variations in the coverage. A deposit premium paid at the beginning is to be adjusted thereafter according to the value of the property at risk from month to month. At the end of the term, the monthly values are averaged and the premium calculated. If the premium based on the averaged values at the termination of the policy exceeds the deposit premium, the insured pays the excess, if less, the insurer refunds the difference in excess of the minimum premium of One Hundred Dollars ($100.00).

To determine the value of the property at risk, the insured must make a monthly report of values, according to the terms of the "value reporting clause" (Paragraph 8):

> "(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.
>
> (B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in

the last report of values filed prior to the loss; [26] and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein."

The policy contains a "full reporting clause" or "honesty clause", (paragraph 9) so drawn that if the insured declares his property at a figure below its actual value, his recovery is limited to such proportion of the loss as the value declared bears to the actual value of the property. Where he diminishes his premium, he diminishes his potential recovery. This paragraph also prevents an unjust recovery based on an over-evaluation of the property, by means of a formula not material to the issues in this case.

The plaintiffs contend their recovery should be based upon the reported value of Twenty-nine Thousand Six Hundred and Twenty-five Dollars ($29,625.00), which they contend was reported within the thirty day grace period. The defendant, on the other hand, contends the policy is void due to a material misrepresentation, or in the alternative, that the plaintiffs are bound by their representation of January 3, 1946, and in that event, plaintiffs' recovery should be based upon a valuation of Two Thousand Dollars ($2,000.00).

Taking up the plaintiffs' contention first, it will be noted they are basing their claim upon values reported after the loss occurred. This approach would be contrary to, and in direct conflict with subdivision (B) of paragraph 8 of the policy heretofore quoted. A reading of this section indicates that the period of grace for the filing of reports of values under no circumstances extends

to a time after the fire loss, even if it is assumed that the thirty day grace period had not expired. However, strict enforcement of such a provision would preclude recovery under a new policy until an evaluation had been made, and it has been held in cases dealing with similar policies that where the loss occurs before a required inventory is taken, but within the grace period, or where no grace period is provided, within a reasonable time, an inventory or report made after the loss is sufficient upon which to base recovery. [27] National Liberty Insurance Co. v. Norman, 4 Cir., 11 F. (2d) 59; Schenley Distillers Corp. v. U. S. Fire Ins. Co., 2 Cir., 90 F. (2d) 633.

In following through plaintiffs' contention, it is necessary to determine whether or not the thirty day grace period had expired.

A policy takes effect from its date, unless it be otherwise stated. Union Ins. Co. v. American Fire Ins. Co., 107 Cal. 327, 40 Pac. 431. The policy was effective in December, 1945. A report of values was due on the last day of each month of the policy term, so a report of values was due under the new policy, as well as on the old policy, on December 31, 1945. If it be argued that no report could be expected since the policy covered only one day in the month of December, this departure from the express words of the contract would put us in the difficult position where we must determine how and where to draw the line. Would a report be due if the effective date were December 30, or December 20, or December 16? Must the policy have been effective a week, or half a month, or the whole month? The words of the policy are clear and unambiguous in this regard—under the new policy a report was due on December 31, 1945.

Plaintiffs' report of January 3rd was within the terms of paragraph 8 (A), and since they made no other report during January, the conclusion is inescapable that the single report covered both the old and the new policies. They stated that the property was worth Two Thousand Dollars ($2,000.00) on December 31, 1945. If it was worth Two Thousand Dollars ($2,000.00) under the old policy on that day, it was worth no more under the new one. They cannot blow cold when their figures are to be used to compute premiums, and blow hot when they are to be relied on to compute the company's liability. The mere circumstance that the report they made was also within the terms of the old policy, which was a separate and distinct contract, does not alter the fact that it was within the terms of the new policy. To hold otherwise would enable the plaintiffs to profit by their own wrong, and would void the policy as hereinafter discussed. [28]

If plaintiffs' contention that the January 3rd report was not made under the new policy is accepted, they are in complete default, since the thirty day grace period expired on January 30, 1946. Where there has been no evaluation at all, and a definite period is set within which to state the value; a failure by the insured to comply with the requirement is sufficient ground for the insurer to avoid all liability. Royal Insurance Co. v. Kline Bros., 2 Cir., 198 F. 468; Istrouma Mercantile Co. v. Northern Assurance Co., 183 La. 855, 165 So. 11.

Even if the statement of falsely low values would not be grounds for avoidance when the insurer protects him-

self with an "honesty clause" and does not rely on its accuracy, nevertheless some figure must be given in order to create a base for calculating the liability after loss, and to adjust premiums. It is material that the declaration of values be within the period of grace, for if the insured could wait until the risk was past, and then understate the value of the property which had been subject to the risk, he would get the benefit of full coverage with an unjustly low premium. Atlantic Fruit Co. v. Hamilton Fire Ins. Co., 251 N. Y. 98, 167 N. E. 184; cf. Rivaz v. Gerussi Bros., 6 Q. B. D. 222, 50 L. J. N. S. 176.

Although an ambiguous insurance policy must be interpreted most strongly against the insurer, Fritz v. Metropolitan Life Ins. Co., 50 Cal. App. (2d) 570, 123 P. (2d) 622, we cannot create an ambiguity where none exists. American National Bank v. Service Life Ins. Co., 120 F. (2d) 579, 137 A. L. R. 1148; Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co., 183 U. S. 402, 22 S. Ct. 124, 46 L. Ed. 253. By no stretch of the imagination can the February report be brought within the terms of the phrase "the last report of values filed prior to the loss". It was filed after the loss. The only report of values filed prior to the loss was filed on January 3, 1946.

Passing now to the contention of the defendant to the effect that the policy is void due to a material misrepresentation [29] or concealment of values. If the representations or concealments are material, then of course

the policy is void. Gates v. General Casualty Co., 9 Cir., 120 F. (2d) 925; Strangio v. Consolidated Indemnity & Insurance Co., 9 Cir., 66 F. (2d) 330. But the misrepresentation must be material to the risk, or the rights and liabilities arising from the contract. It must be such that "it would have influenced the underwriter either not to underwrite at all, or not to underwrite, except at a higher premium". Hare & Chase, Inc. v. National Surety Co., 49 F. (2d) 447, 457; Transcontinental Ins. Co. v. Minning, 135 F. (2d) 479, 481.

Under the second policy, the plaintiffs reported a value only one fourteenth of the true worth of the insured property. But if the insurer had known this would it have acted differently? The policy is so drawn that any understatement of value limits the recovery, without a proportionate saving in premiums. For instance, under the old policy the premium rate was ninety-six cents per One Hundred Dollars ($100.00) insured. Since the minimum premium was One Hundred Dollars ($100.00), plaintiffs paid at the rate of Two Dollars and Fifty Cents ($2.50) per One Hundred Dollars ($100.00) insured by stating an average value of Four Thousand Dollars ($4,000.00). The defendant received a premium two and one-half times as large as was earned by the risk assumed. If the plaintiffs state Two Thousand Dollars ($2,000.00) as the value, they must pay a premium at the rate of Five Dollars ($5.00) per One Hundred Dollars ($100.00) insured. Only the insurer can profit by the insured's choosing to bear such a large part of the risk, and no in-

surer would rescind a policy under these circumstances. I find that the understatement was immaterial. Jeffords v. Tokio Marine & Fire Ins. Co., 123 S. C. 467, 117 S. E. 79, 81.

If the under-evaluation during the term of the new policy is immaterial, it is even less material that plaintiffs understated values under the old one. The California Insurance Code §334, in treating with negotiations before the execution of the contract, provides: [30]

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

No disadvantageous fact was concealed from the defendant. It gained by plaintiffs' understatements. Counsel suggests that had the company known the actual value of the property, it would have demanded and received a larger deposit premium. But the plaintiffs' course of conduct in 1945, in declaring low values, would have indicated that the premium of One Hundred Dollars ($100.00) already received was going to be more than adequate for 1946. There was no reason to demand more.

Rivaz v. Gerussi Bros., 6 Q. B. D. 222, 50 L. J. N. S. 176, on which the defendant relies strongly did not present the same problem as we have here. In that case, under a prior policy, the insured had waited until after

the risk had passed before stating the value of the merchandise covered; then he stated a falsely low value to obtain a low premium rate. This was a clear breach of trust since he actually owed a larger premium. A material misrepresentation under a prior connected policy is sufficient to void the policy sued on. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859; Eddy v. National Union Indemnity Co., 9 Cir., 78 F. (2d) 545, 80 F. (2d) 284; Sun Ins. Co. v. Roy [1927], 1 D. L. R. 17, 62 A. L. R. 818. But where the misrepresentation or concealment is immaterial, it does not create grounds for rescission or avoidance. In the present case an understatement does not breach the trust since the insurer is unharmed. The representation is of no importance to the insurer, except to calculate the premiums due at the end of the year. The insurer has committed himself to accepting a fluctuating scale of values but is protected by the "honesty clause" whatever value is declared.

I therefore find that the plaintiffs are entitled to recover upon the basis of their report of January 3, 1946. [31]

Counsel for plaintiffs is directed to submit forthwith proposed findings and judgment in accordance with this opinion.

Dated: This 19 day of February, 1947.

BEN HARRISON

Judge

[Endorsed]: Filed Feb. 19, 1947. [32]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 6th day of January, 1947 before the Court sitting without a jury, a jury having been expressly waived, George Penney appearing for the plaintiffs and Hindman and Davis by E. Eugene Davis appearing for the defendant, a written stipulation of facts having been entered into between the parties, and oral and documentary evidence having been introduced, and the cause submitted for decision, the Court now makes its findings of fact as follows:

I.

That it is true that the plaintiffs were partners doing business under the fictitious name of Fullerton Manufacturing Co. and were and now are citizens of the State of California. [33]

II.

That the defendant was and now is a corporation organized under and by virtue of the laws of the State of Connecticut, and was and now is a citizen of the State of Connecticut, and was authorized to write fire insurance under and by virtue of the laws of the State of California pertaining to insurance companies.

III.

That the amount in controvery exclusive of interest and costs exceeds the sum of $3000, and the court has jurisdiction based upon diversity of citizenship of the parties hereto as well as the amount in controversy, the same being in excess of $3000.

IV.

That on or about the 31st day of December, 1945, for a valuable consideration, the defendant issued a certain fire insurance policy on the California standard form with a provisional reporting endorsement thereon, in which it insured the property of the plaintiffs in an amount not to exceed $15,000. That said policy of insurance provided as follows:

" 'Value Reporting Clause.'

(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

(B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the [34] locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein.

"'Full Reporting Clause.' Liability under this policy shall not in any case exceed that proportion of any loss hereunder (meaning the loss at the location involved after deducting the liability of specific insurance, if any) which the last value reported to this company prior to the loss, less the amount of reported specific insurance, if any, at the location where the loss occurs, bears to the actual cash value of the property above described, less the amount of specific insurance, if any, actually in force at that location at the time of such report. Liability for loss hereunder occurring at any new location where, since filing the last report, the insured may have property as above described (except as provided in 'Value Reporting Clause,' paragraph 8) shall be apportioned in a like manner, except that the proportion used shall be the relation that the values at all locations reported prior to the loss, less the amount of reported specific insurance, if any, bear to the actual cash value of the property above described at all locations, less the amount of specific insurance, if any, actually in force at the time of such report. However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss." [35]

V.

That on or about the 14th day of February, 1946, and while said policy of insurance was in full force and effect, a fire occurred on the premises of the plaintiffs resulting in a loss in the amount of $27,253.18.

VI.

The Court further finds that the defendant issued a policy of insurance in December, 1944 in the provisional amount of $30,000 on which a premium was paid. That while said policy was in full force and effect the plaintiffs requested that the provisional limit be reduced to $15,000, which was accordingly done. That under said policy of insurance the plaintiffs reported to the defendant at the end of each month the values on hand for the preceding month. That the plaintiffs reported to the defendant on the 31st day of January, 1945 that the actual cash value of the property at the plaintiffs' place of business was $5000 when as a matter of fact the actual cash value was the sum of $19,856; that on the 28th day of February, 1945 plaintiffs reported values of $6000 when as a matter of fact the actual cash value was the sum of $21,535; that on the 31st day of March, 1945 plaintiffs reported values of $7000 when as a matter of fact the actual cash value was the sum of $23,214; that on the 30th day of April, 1945 plaintiffs reported values of $8000 when as a matter of fact the actual cash value was the sum of $24,820; that on the 31st day of May, 1945 plaintiffs reported values of $4000 when as a matter of fact the actual cash value was the sum of $25,331; that on the 30th of June, 1945 plaintiffs reported values of $4000 when as a matter of fact the actual cash value was the sum of $25,842; that on the 31st day of July, 1945 plaintiffs reported values of $4000 when as a matter of fact the actual cash value was the sum of $26,353; that on the 31st day of August, 1945 plaintiffs reported values of $2000 when as a matter of fact the actual cash value was the sum of [36] $26,864; that on the 30th day of September, 1945 plaintiffs reported values of $2000 when

as a matter of fact the actual cash value was the sum of $27,375; that on the 31st day of October, 1945 plaintiffs reported values of $2000 when as a matter of fact the actual cash value was the sum of $27,886; that on the 30th day of November, 1945 plaintiffs reported values of $2000 when as a matter of fact the actual cash value was the sum of $28,338.33; and on the 3rd day of January, 1946 plaintiffs reported the cash value of the property as of December 31, 1945 to be the sum of $2000 when in truth and in fact the actual cash value was, as of December 31, 1945, the sum of $28,140.72.

VII.

The Court further finds that the plaintiffs failed to report the cash value of the property on the 31st day of January, 1946, but on February 26 the plaintiffs reported that the true value of the property at the time of the fire was $29,625.20. That a sworn proof of loss was filed by the plaintiffs on the 16th day of August, 1946 setting forth the value of the property at the time of the loss in the amount of $29,625.20 and the damage to the property in the amount of $27,253.18 and claiming a loss under the policy in the amount of $13,798.50. The Court finds that the defendant admitted the amount of the loss but denied that any recovery was due under the terms and conditions of the policy.

VIII.

The Court finds that under the terms and conditions of the policy in effect at the time of the fire the re-

port made on January 3, 1946, determines the liability of the defendant to the plaintiffs and that the defendant's liability shall be in the proportion that $2000/28,140.78 X the loss of $27,253.18 and that the limit of coverage amounts to $1936.92.

IX.

The Court further finds that the plaintiffs, in reporting [37] undervaluations during the term of the policy in existence in 1945 did not breach the conditions of the policy because the insurer was not harmed by the statements of undervaluation. The representations as to values were far less than the minimum earned premium.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts the Court finds:

I.

That the plaintiffs are entitled to judgment against the defendant in the sum of $1936.92, together with interest thereon from the 14th day of May, 1946 at the rate of 7 per cent per annum, together with their costs of suit.

Judgment is hereby ordered to be entered accordingly.

Dated this 25 day of March, 1947.

BEN HARRISON
Judge [38]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 25, 1947. [39]

In the District Court of the United States
Southern District of California
Central Division

No. 5814-BH

L. WALLACE and E. B. LANDRY, a copartnership, doing business as FULLERTON MANUFACTURING CO.,

Plaintiffs,

vs.

WORLD FIRE AND MARINE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation,

Defendants.

JUDGMENT

This cause came on regularly for trial after due and proper notice thereof on the 6th day of January, 1947, in the United States District Court, Southern District of California, Central Division, the Honorable Ben Harrison, Judge Presiding, and evidence having been introduced, both oral and documentary, a written stipulation of facts having been entered into between the parties, and the cause having been submitted, and findings of fact and conclusions of law having been duly made, it is now therefore Ordered, Adjudged and Decreed that the plaintiff have and recover from the defendant the sum of $1936.92, together with interest thereon at the rate of 7 per cent per annum from the 14th day of May, 1946, together with costs in the amount of $17.80.

Dated at Los Angeles, California, this 25 day of March, 1947.

BEN HARRISON
Judge

Judgment entered Mar. 25, 1947. Docketed Mar. 25, 1947. Book C. O. 42, page 303. Edmund L. Smith, Clerk; by Murray E. Wire, Deputy.

[Endorsed]: Filed Mar. 25, 1947. [40]

[Title of District Court and Cause]

SUBSTITUTION OF ATTORNEYS

Come now the plaintiffs and substitute as their attorneys in the above-entitled action William H. Levit and Benjamin J. Goodman in place and instead of George Penney.

Dated: March 27, 1947.

L. WALLACE and E. B. LANDRY,
a co-partnership, doing business as
FULLERTON MANUFACTURING CO.
By L. Wallace

I, George Penney, attorney of record for plaintiffs in the above-entitled action, do hereby consent and agree to the substitution of William H. Levit and Benjamin J. Goodman as attorneys for the plaintiffs in my place and in my stead. [41]

Dated: March 27, 1947.

GEORGE PENNEY

We, the undersigned, William H. Levit and Benjamin J. Goodman, hereby consent and agree to the foregoing substitution and consent and agree to act as attorneys for the plaintiffs.

Dated: March 27, 1947.

WILLIAM H. LEVIT
BENJAMIN J. GOODMAN

[Endorsed]: Filed Mar. 28, 1947. [42]

[Title of District Court and Cause]

MOTION FOR A NEW TRIAL AND MOTION TO OPEN JUDGMENT AND TAKE ADDITIONAL TESTIMONY PURSUANT TO RULE 59

The plaintiffs move the court as follows:

I.

To grant a new trial on all of the issues on the following grounds:

(a) Accident or surprise which ordinary prudence could not have guarded against;

(b) Newly-discovered evidence material to the plaintiffs, which they could not with reasonable diligence have discovered and produced at the trial;

(c) Insufficiency of the evidence to justify the decision and judgment of the court in the following particulars:

Under the policy of insurance #4801476, issued [43] by defendant to plaintiffs on December 31, 1945, no report of values was required to be filed by plaintiffs thereunder until thirty days after the 31st day of January, 1946; that the report of values filed by plaintiffs on January 3, 1946, was a report filed under a prior policy issued to plaintiffs by defendant on December 31, 1944, being policy #013121 which expired at noon on December 31, 1945, and which said report covered the period under said prior policy from December 1, 1945, to December 31, 1945, and which said report had no bearing on said policy #4801476 and was not a report of values under said policy; that under the terms of said policy #4801476, and since no report of values had been filed under said policy prior to said loss, and since no report of values was delinquent under said policy (paragraph 9—full reporting clause) prior

to said loss, plaintiffs were entitled to recover the proportion of such loss that the limit of liability specified in said policy bore to the actual cash value of the property described in said policy at the time of loss, to-wit, the sum of Thirteen thousand, seven hundred ninety-eight dollars and fifty cents ($13,798.50).

That in any event and even though said policy #4801476 be construed to have required plaintiffs to have filed a report of values thereunder as of the 31st day of December, 1945, with a grace period of thirty days thereafter, the only penalty provided in said policy for failure to file said first report of values due under said policy within the time specified is the following:

> "8. 'Value Reporting Clause.' . . . (b) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover . . . for not more than the amounts included in the last report of values filed [44] prior to the loss . . . ;"

that since no report of values was filed by plaintiffs under said policy prior to said loss, the insurer is liable pursuant to paragraph 9 (full reporting clause) for the proportion of such loss that the limit of liability specified in the policy bears to the actual cash value of the property described at the time of loss, to-wit: the sum of Thirteen thousand, seven hundred ninety-eight dollars and fifty cents ($13,798.50).

(d) Error in law occurring at the trial in the following particulars:

That the decision is against the law for the same reasons specified immediately hereinabove under specification I(c).

II.

To open the judgment and take additional testimony in the following respects:

To introduce in evidence on behalf of plaintiffs that certain written report of values dated January 3, 1946, which said report was filed by the plaintiffs with the defendant under policy #013121 covering the period from December 1, 1945, to and including December 31, 1945, and which said report of values is specifically referred to in paragraph VI of the agreed statement of facts, and in the opinion of the trial court herein, and in paragraphs VI and VIII of the findings of fact and conclusions of law herein, but which said report was not introduced in evidence at the trial of this case.

This motion is based upon the pleadings and papers on file herein, upon the minutes of the court, and upon the affidavits of Benjamin J. Goodman and George Penney filed herewith.

WILLIAM H. LEVIT and
BENJAMIN J. GOODMAN
By Benjamin J. Goodman
Attorneys for Plaintiffs [45]

NOTICE OF MOTION

To World Fire and Marine Insurance Company of Hartford, Connecticut, and to Hindman & Davis, Its Attorneys:

Please Take Notice that the undersigned have filed, or are about to file, the above motion for a new trial with the above-entitled court, and that said motion will be brought on for hearing at a date to be fixed by the court.

Dated: March 28, 1947.

WILLIAM H. LEVIT &
BENJAMIN J. GOODMAN
By Benjamin J. Goodman
Attorneys for Plaintiffs
608 South Hill Street
Los Angeles 14, California [46]

STATEMENT OF REASONS AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION

1. The grounds of accident or surprise, newly discovered evidence, and the motion to reopen the judgment and take additional testimony.

The purpose of the motion on these grounds is to reopen the judgment so that the report of values of January 3, 1946 may be introduced in evidence. As appears from the affidavits filed herewith, the report was not offered in evidence at the trial, because of the inadvertence of plaintiffs' former counsel. On March 18, 1947, after the Court's opinion was rendered, the omission was discovered and called to said counsel's attention by plaintiffs' present counsel, with a request that he immediately move to re-

open the case. Before so doing, he attempted to obtain a stipulation from defendant's counsel allowing the report in evidence. This failed, and at about the same time (March 25) the findings were signed and the judgment entered. This was immediately followed by the substitution of counsel and the filing of this motion.

It cannot be denied that this report goes to the very essence of both plaintiffs' and defendant's case. It is specifically referred to in the Agreed Statement of Facts, the Court's opinion and the Findings of Fact. The Court's opinion is founded on the premise that this report applied to the new policy (the policy in suit). As stated in the opinion "* * * the conclusion is inescapable that the single report covered both the old and the new policies." Having so construed the report, the Court concluded that recovery was limited by the values specified in said report.

A copy of the report is attached to this Motion as an exhibit, and it appears therefrom that by its terms it was made [47] under and refers only to policy 013121 (the old policy). It is submitted that had the Court had the opportunity to examine the report before reaching its decision it would have so concluded.

Under Rule 59, in an action tried without a jury, the trial court has authority to grant a new trial "for any of the reasons for which rehearings have heretofore been granted in suits in equity", and "may open the judgment * * *, take additional testimony * * * and direct the entry of a new judgment."

An examination of the authorities supports the proposition that the trial court has ample authority under the situation here presented to open the judgment, permit the introduction of the report and then enter a new judgment.

In the case of Moore v. United States, 59 Fed. Supp. 660, the District Court filed its opinion on August 18, 1944, and judgment was entered dismissing the complaint on September 21, 1944. On September 28, 1944, plaintiff filed a motion to set aside the judgment and to reopen the case and for leave to file an amended complaint. The District Court granted the motion stating:

> "The first question which should be considered is the right of the court to set aside a judgment duly entered. It is a well recognized rule of reason and justice that a party is entitled to his day in court, but there must be an end to litigation. This case had been pending several months before it came to trial, the memorandum opinion was handed down on August 18, 1944, but no steps were taken before judgment was entered to remedy the defect pointed out in the opinion. A judgment should not be lightly set aside.
>
> "However, it is well recognized that where justice requires, formalities of procedure should not interfere. A new trial may be granted, and the court may open the judgment and take additional testimony for any of the reasons for which rehearings have been granted in suits in equity in the courts of the United States. Federal Rules of Civil Procedure, rule 59, 28 U. S. C. A. following sec. 723 C.
>
> "Consequently, there is no need to let the judgment stand in the way, if the justice of this case requires that it be reopened for further proceedings."

Since Rule 59 refers to the granting of rehearings in suits in equity, it is pertinent to refer to the case of Hazeltine [48] Corp. v. Wildermuth (C. C. A. 2) 35 Fed. (2nd) 733, which was an equity suit involving a situation

quite similar to that here presented. There the District Court had entered a decree in a patent infringement suit for the plaintiff. The defendant appealed to the Circuit Court where the decree was affirmed, and a petition for reargument denied. Before the Circuit Court issued its mandate to the District Court, the defendant appellant moved the Circuit Court for an order to show cause why the cause should not be remitted to the District Court for the taking of further evidence. According to the opinion, the evidence sought to be introduced was a physical exhibit which was described in the evidence at the trial by a drawing. (This is directly analogous to the instant case where the report of January 3 was referred to in the Agreed Statement.) The Circuit Court granted the Motion stating:

> "The appellant seeks to offer a physical exhibit, which was described in the evidence at the trial by a drawing. Whether a rehearing should be granted or denied rests with the trial judge. * * * The Circuit Court of Appeals cannot set aside a decree on newly discovered evidence. * * * We may, however, grant permission to the District Court to hear and determine such application for a rehearing, exercising a sound discretion. * * * This should be done by asking the District Court to consider the application for a rehearing on the newly discovered proofs."

While the Circuit Court did not instruct the District Court to admit the exhibit, it is clear from the opinion that the District Court had authority, in the exercise of a sound discretion to do so.

And in the case of Folmer Graflex Corp. v. Graphic Photo Service, 45 Fed. Supp. 749, a new trial was granted under Rule 59 because the Court felt that it had not given sufficient consideration to certain authorities.

We believe that the foregoing authorities establish that this Court has ample authority to grant plaintiffs' motion on the grounds stated. Whether or not it will do so is, of course, a [49] matter for the Court to determine in the exercise of a sound discretion. In this connection, we respectfully request the Court to bear in mind that (1) the report in question is admittedly the most vital evidence in the case both for plaintiffs and defendant, (2) it formed the very basis of the court's decision, (3) its admission at this time can be accomplished without causing injury to the defendant, or any undue inconvenience or delay, and (4) even though the Court concludes that with the report in, its decision will remain unchanged, plaintiffs should be permitted to have the record complete and in accordance with the facts. In this connection, we believe the following language from the case of Bowles, etc. v. Six States Coal Corp., 64 Fed. Supp. 651, which involved an application to reopen a case and take additional evidence should guide the Court in passing upon this motion:

> "The proceeding was filed on December 29, 1944, and counsel for the plaintiff has certainly had ample opportunity or time to properly prepare said case for trial, and there is no justification or reason existing for the oversight which was allowed to occur by counsel for the plaintiff. However, a lawsuit is not a battle or contest of wits; it is a fair struggle for a

just decision, and although considerable inconvenience and expense has been caused the defendants due to the inadvertence on the part of the counsel for the plaintiff, the court does not see how any injury can be done to the defendants or any substantial injustice arise by permitting the introduction of the testimony desired by the plaintiff * * *.

"It is the primary duty of the court to render justice and fairness to all persons concerned in any litigation, and the Court therefore feels in the exercise of this discretion that in order for the issues joined in this proceeding to be fairly tried and adjudicated, the request of the plaintiff should be granted."

2. The grounds of insufficiency of the evidence and error in law.

It is plaintiffs' contention that the report of January 3, 1946 was not a report under the new policy and that no report of values was due under that policy until 30 days after January 31, 1946. If this be correct, then as pointed out in the Court's [50] opinion citing the cases of National Liberty Insurance Co. v. Norman, 11 Fed. (2nd) 59, and Schenley Distillers Corp. v. U. S. Fire Insurance Co., 90 Fed. (2nd) 633, plaintiffs were entitled to file their first report after the loss and to recover on the basis of the values set forth in that report.

However, even if it be conceded that the Court was correct in its conclusion that a report was due under the new policy on December 31, 1945, the inception date of

the policy, and which report became delinquent on January 31, 1946, it is submitted that plaintiffs are nevertheless entitled to recover on the basis of the report filed after the loss.

The Court considered this possibility in its opinion and rejected it on the ground that failure to file a report within the period required by the policy "is sufficient ground for the insurer to avoid all liability," citing Royal Insurance Co. v. Kline Bros., 198 Fed. 468, and Istrouma Mercantile Co. v. Northern Assurance Co., 165 So. 11. But those cases dealt with entirely different types of policies and reports, and in each case the policy contained a specific provision voiding it for failure to keep or file the required reports. The instant policy not only fails to contain an avoidance clause, but specifically provides what the penalty shall be for delinquency in filing reports. Paragraph 8 B provides that in the event loss occurs while the assured is delinquent in reporting, the recovery shall be limited to "the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein." Here we have clear and unambiguous language prepared by the company specifying in detail the only penalty for delinquent filing. And since the latter portion of the clause specifically mentions delinquency in filing the first report of [51] values, it is clear that the first portion of the clause by referring to the "last report of values" can have no application to delinquency in filing the first report,

and that the only penalty therefor is that specified in the last portion of the clause, viz., that the policy shall "cover only at the locations specifically named herein." Since the language was drawn by the insurer and since it is unambiguous, it is submitted that an additional penalty (avoidance) may not be added thereto.

However, says the Court in its opinion, in any event a report of values must be filed during the grace period, "for if the insured could wait until the risk was past, and then understate the value of the property which had been subject to the risk, he would get the benefit of full coverage with an unjustly low premium," citing Atlantic Fruit Co. v. Hamilton Fire Insurance Co., 167 N. E. 184. But that case dealt with the old form of provisional reporting policy which did not contain the "Value Reporting Clause" or the "Full Reporting Clause." In that case, only one policy was involved and the insured had repeatedly underreported values thereunder. The Court held that the policy was thereby voided. But that case is not authority under the form involved in this suit. With its "Value Reporting Clause" and "Full Reporting Clause," the insurer has anticipated understatements of value and provided in detail what the penalty therefor shall be, and avoidance is not included therein. There has been no underreporting of values under the policy in suit. At most there has been a delay in filing the first report, and as noted above, the only penalty provided has no application, as no claim is being made for loss at any location other than that specified in the policy.

The form is meticulously drawn in order to fully protect the insurer against understatements and delinquencies from the time the first report of values is filed. Had the insurer [52] desired the same protection during the initial period from the inception date of the policy to the date of filing the first report, it would have been a simple matter to have provided in the policy for a report of values to have been filed on the inception date, and to have limited recovery to those values during that initial period. For reasons best known to it, the insurer did not see fit to so provide.

It is therefore submitted that the only limit of liability applicable in this case is the last sentence of paragraph 9 (Full Reporting Clause) which provides that the "Company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss." Applying that formula to the instant case, plaintiffs are entitled to recover the sum of $13,798.50.

Respectfully submitted,

WILLIAM H. LEVIT
BENJAMIN J. GOODMAN [53]

Received copy of the within Motion this 31 day of March, 1947. E. Eugene Davis.

[Endorsed]: Filed Mar. 31, 1947. [54]

[Title of District Court and Cause]

AFFIDAVIT OF BENJAMIN J. GOODMAN IN SUPPORT OF MOTION FOR NEW TRIAL AND TO OPEN JUDGMENT FOR FURTHER TESTIMONY

State of California
County of Los Angeles—ss.

Benjamin J. Goodman, being first duly sworn, deposes and says:

That on or about March 10, 1947, your affiant was consulted by the plaintiffs in the above-entitled action for the purpose of determining whether or not plaintiffs should take any further action in the prosecution of their claim against the defendant; that your affiant communicated by telephone with Mr. George Penney, attorney for the plaintiffs, and requested an appointment for a conference with Mr. Penney, Mr. L. Wallace, one [55] of the plaintiffs in the above-entitled action, and your affiant. That an appointment was made, and Mr. L. Wallace and your affiant had a conference with Mr. Penney, which conference was held at the office of Mr. Penney within a few days after March 10, 1947.

That your affiant inquired of Mr. Penney at said conference if he had a copy of the report of values dated January 3, 1946, and referred to in the opinion of the trial court; that your affiant was informed by Mr. Penney that he did not have a copy of the report; but that he was of the opinion that a copy was introduced in evidence in the above-entitled action at the trial thereof.

That after the conference with Mr. George Penney, affiant requested of the plaintiffs to secure for him a copy

of the report of values dated January 3, 1946, and a copy was delivered to your affiant prior to March 18, 1947. That attached hereto, marked "Exhibit A," and by reference made a part hereof, is a true and correct copy of said report of values dated January 3, 1946, being the same report of values referred to in paragraph VI of the agreed statement of facts, and in the opinion of the trial court herein, and in paragraphs VI and VIII of the findings of fact and conclusions of law herein.

That, on March 18, 1947, your affiant received from Mr. Penney a copy of proposed findings of fact and conclusions of law in the above-entitled action which were filed with the court on or about March 18, 1947. That at the same time there was delivered by Mr. George Penney to affiant a copy of the following letter addressed to one of the plaintiffs, Mr. L. Wallace:

> "This is to advise you that I have this day filed the findings of fact and conclusions of law.
>
> "I was unable to answer Mr. Davis's inquiry as to whether or not you intend to take an appeal, and I anticipate that he will make certain objections [56] to the findings and that we probably will have another court hearing to settle the question of the objections. I am trying to avoid any unnecessary expense on your part, and if you decide that you do not intend to appeal I would suggest that you notify me immediately."

That thereafter, on March 18, 1947, affiant talked to Mr. George Penney on the telephone and was advised by him that if the plaintiffs intended to take an appeal in the above-entitled action Mr. Davis, counsel representing

defendant, would probably want to file objections to the findings of fact and conclusions of law.

That thereafter, on March 18, 1947, affiant personally went to the office of the Clerk of the United States District Court and there examined the records and files in this action, including the transcript of proceedings at the trial and the exhibits introduced in evidence; that your affiant then learned for the first time that the report of values dated January 3, 1946, had not been introduced in evidence at the trial.

That immediately upon affiant returning to his office on March 18, 1947, affiant addressed a letter to Mr. George Penney in which the affiant stated as follows:

> "This afternoon I went down to the office of the Clerk of the District Court to examine the file and records in the above-entitled case. I examined the exhibits and read the Reporter's Transcript of the evidence and stipulations taken at the trial on the agreed statement of facts.
>
> "I wanted to make sure that the record contained the original or a copy of the report made by our client on Janunary 3, 1946, covering the period from December 1, 1945, to December 31, 1945, which refers only to policy #013121, which expired at noon, December 31, 1945. I [57] found that the report was not introduced in evidence, and that there is no reference in the Reporter's Transcript or in the agreed statement of facts to the report as pertaining to the policy #013121, which would indicate that the report was filed in reference to that policy alone and not to the new policy which was introduced in evidence as plaintiff's exhibit No. 1.

"The failure to introduce the original report, or a copy thereof, is probably due to the inadvertence of both counsel, and I feel that this report is very material on the issues. The agreed statement of facts refers to the report but does not indicate that the report was applicable to the old policy, and I therefore assume that Judge Harrison interpreted that portion of the agreed statement of facts pertaining to the report as applicable to both policies.

"It is Mr. Wallace's intention to take an appeal in this case, and an attempt should be made to place in evidence the report of January 3, 1946. There are several ways in which this attempt can be made.

"On behalf of Mr. Wallace, I request that a motion be instituted to reopen the case for the sole purpose of introducing in evidence the original or a correct copy of the report of January 3, 1946. This motion should be supported by an affidavit setting forth a true and correct copy of the report so that it will appear in the record in the event that Judge Harrison denies the motion. The motion should be predicated upon the ground that the original report of January 3, 1946, was omitted because of inadvertence of counsel.

"If this motion is denied, then another will have to be made by way of motion for new trial. [58]

"I feel that in view of the fact that you have represented the plaintiff in this case up to this point, if the motion was made and presented by you rather than by substituted counsel, there would be a greater chance of the motion being granted. If the motion is denied, after judgment is entered, and I am sub-

stituted in your stead, I will then institute a motion for new trial for the purpose of trying to introduce in evidence the report referred to. . . .

"If I can be of any service to you in the preparation of the motion and affidavit, do not hesitate to call upon me, and I will be glad to render any service that I can in the premises. I am enclosing for your files several copies of the report in question, which can be used as exhibits and attached to the affidavit."

That on March 20, 1947, affiant received in due course of mail a letter from Mr. George Penney, in which he stated as follows:

"Replying to your communication of March 18, I have this day written to Mr. Davis of Hindman & Davis asking him to stipulate that a copy of the report for the period ending December 31, 1945 be admitted in evidence. I am satisfied that this can be done by stipulation, and I shall let you know as soon as I have received a reply from him."

That on March 24, 1947, affiant addressed another letter to Mr. Penney, as follows:

"Will you be good enough to advise me of the time and place set for the hearing on the settlement of the findings of fact and conclusions of law. I would like to avail myself of the opportunity of appearing in the courtroom at that time without participating in any of [59] the proceedings."

That on March 26, 1947, not having heard from Mr. Penney, your affiant telephoned Mr. Penney and was thereupon advised by Mr. Penney that the findings of fact and conclusions of law had been signed and judg-

ment had been entered on March 25, 1947, and that Mr. E. Eugene Davis, counsel for defendant, had refused to stipulate to the introduction in evidence of the report of values dated January 3, 1946. That affiant had no source of knowledge or information other than herein stated that the findings of fact and conclusions of law were signed or were about to be signed, and the judgment entered, and that your affiant relied upon the letter of Mr. George Penney dated March 19, 1947, above referred to, and verily believed that Mr. Davis would stipulate to the introduction in evidence of the report of values of January 3, 1946, or in the alternative that Mr. Penney would make a timely motion to reopen the case for the purpose of introducing said report of values into evidence prior to the signing of the findings of fact and entry of the judgment.

Further, affiant saith naught.

BENJAMIN J. GOODMAN

Subscribed and sworn to before me this 28th day of March, 1947.

(Seal) BYRON SCHWARTZ

Notary Public in and for the County of Los Angeles, State of California [60]

EXHIBIT A

Standard Forms Bureau Forms 448 (Mar. 1936)
(PROVISIONAL FORM)

STATEMENT OF VALUES AND SPECIFIC INSURANCE

For the period beginning Dec. 1st, 1945, and ending December 31st, 1945, under terms of Policy No. 013121 of the The World Fire and Marine Insurance Co. issued to Fullerton Manufacturing Company by M. C. Lewis & Company Agent at Los Angeles, California

		Forms 1 and 3	Form 1	Form 3	Forms 1 and 3	For Company's Use
Location No.	State	Exact Location of any Property Insured	Total Value in each location as of last day of period shown above	Total weekly average value in each location for period shown above	Specific insurance (if any) in each location on last day of period shown above	
	Calif.	343 East Santa Fe Ave. Fullerton, California	$2,000.00			

The undersigned certifies the foregoing report of values and of specific insurance, for the period named, to be correct.

Jan. 3, 1946
Dated

FULLERTON MANUFACTURING COMPANY
by Gladys Jennings [61]

Received copy of the within Affidavit this 31st day of March, 1947. E. Eugene Davis.

[Endorsed]: Filed Mar. 31, 1947. [62]

[Title of District Court and Cause]

AFFIDAVIT OF GEORGE PENNEY IN SUPPORT OF MOTION FOR NEW TRIAL AND TO OPEN JUDGMENT FOR FURTHER TESTIMONY

State of California
County of Los Angeles—ss.

George Penney, being first duly sworn, deposes and says:

That your affiant was, up to and including March 27, 1947, the attorney of record for the plaintiffs in the above-entitled action.

That your affiant has read the affidavit of Benjamin J. Goodman attached to plaintiffs' motion for a new trial and that, insofar as the same refers to conversations and correspondence had between your affiant and Benjamin J. Goodman, it is in accordance with the facts. [63]

That through inadvertence of your affiant, your affiant neglected to have a true copy of said report of values dated January 3, 1946, attached to the agreed statement of facts herein as an exhibit or to offer the same in evidence on behalf of plaintiffs at the trial of this case.

GEORGE PENNEY

Subscribed and sworn to before me this 28th day of March, 1947.

(Seal) BENJAMIN J. GOODMAN

Notary Public in and for the County of Los Angeles, State of California [64]

Received copy of the within Aff. this 31 day of March, 1947. E. Eugene Davis.

[Endorsed]: Filed Mar. 31, 1947. [65]

[Minutes: Monday, June 2, 1947]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for hearing motion of plaintiffs for a new trial pursuant to notice filed March 31, 1947; Wm. H. Levit, Esq., appearing as counsel for the plaintiffs; E. Eugene Davis, Esq., appearing as counsel for the defendant;

It is ordered that the said motion is denied. [66]

[Title of District Court and Cause]

SUBSTITUTION OF ATTORNEYS

Come now the plaintiffs and substitute as their sole attorney in the above entitled action Benjamin J. Goodman in place and in stead of Benjamin J. Goodman and William H. Levit.

Dated: 6/14, 1947.

L. WALLACE and E. B. LANDRY,
a co-partnership, doing business as
FULLERTON MANUFACTURING CO.
By L. Wallace

I, William H. Levit, one of the attorneys of record for plaintiffs in the above entitled action, do hereby consent and agree to the substitution of Benjamin J. Goodman as the sole attorney for the plaintiffs in my place and in my stead.

Dated: June 7, 1947.

WILLIAM H. LEVIT [67]

I, the undersigned, Benjamin J. Goodman, hereby consent and agree to the foregoing substitution and consent and agree to act as the sole attorney for the plaintiffs.

Dated: June 7, 1947.

BENJAMIN J. GOODMAN

[Endorsed]: Filed Jun. 20, 1947. [68]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that L. Wallace and E. B. Landry, a copartnership doing business as Fullerton Manufacturing Company, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the following:

a) That portion of the final judgment entered in this action on March 25, 1947, which denies plaintiffs a judgment in the sum of $13,798.50 or in any sum in excess of the sum of $1936.92, but expressly excluding from said appeal so much of said judgment as awards plaintiffs the sum of $1936.92.

b) The order denying plaintiffs' motion for new trial and motion to open judgment and take additional testimony entered [69] herein on June 2, 1947, and from each and every other adverse order, ruling and decision of the Court herein.

BENJAMIN J. GOODMAN

Attorney for Plaintiffs and Appellants L. Wallace and E. B. Landry, a copartnership doing business as Fullerton Manufacturing Co.

[Endorsed]: Filed & mld. copy to Hindman & Davis, defts. attys., Aug. 26, 1947. [70]

[Title of District Court and Cause]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that Fidelity and Deposit Company of Maryland, a corporation, organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto World Fire and Marine Insurance Company of Hartford, Connecticut, a corporation, defendant in the above entitled case, in the penal sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to be paid to said defendant, its successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, That Whereas, L. Wallace and E. B. Landry, a co-partnership doing business as Fullerton Manufacturing Co., plaintiff, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment made and entered on March 25th, 1947, in favor of the plaintiffs by the United States District Court for the Southern District of California, Central Division, in the above entitled case.

Now, Therefore, if the above named appellants shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate

Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect. [71]

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Pricipals or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 20th day of August, 1947.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

By L. D. Jenson
Attorney in Fact

Attest Theresa Fitzgibbons
Agent

The premium charged for this bond is $10.00 per annum.

State of California,
County of Los Angeles—ss:

On this 20th day of August, 1947, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared L. D. Jenson, known to me to be the Attorney-in-Fact, and Theresa

Fitzgibbons, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

S. M. SMITH

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires Feb. 18, 1950.

Examined and recommended for approval as provided in Rule 8.

BENJAMIN J. GOODMAN

Attorney

I hereby approve the foregoing.

Dated this 26th day of August, 1947.

EDMUND L. SMITH

Clerk U. S. District Court, Southern District of California

By Charles A. Seitz

Deputy

[Endorsed]: Filed Aug. 26, 1947. [72]

[Title of District Court and Cause]

APPELLANTS' STATEMENT OF POINTS

Plaintiffs and appellants will rely upon the following points in the prosecution of their appeal from the judgment herein:

I.

The District Court erred in entering its findings of fact on the evidence as follows:

1. In making so much of finding of fact number VI as finds that the report of January 3, 1946 was a report of values under the policy in suit.

2. In making so much of finding of fact number VII as finds that a report of values was due on December 31, 1945, [73] and was delinquent on January 31, 1946.

3. In making finding of fact number VIII.

II.

The District Court further erred as follows:

4. In making conclusion of law number I that plaintiffs are only entitled to judgment against defendant in the sum of $1,936.92 and in failing to conclude that plaintiffs are entitled to judgment against defendant in the sum of $13,798.50.

5. The Court erred in not entering judgment for plaintiffs and against defendant in the sum of $13,798.50.

6. The Court erred in denying plaintiffs' motion for new trial.

7. The Court erred in denying plaintiffs' motion to open the judgment and take additional testimony.

8. The Court erred in failing to find and hold that under the terms of the policy even if a report of values was due on December 31, 1945 and delinquent on January 31, 1946, since such report of values was the first report due under the policy, there was no penalty for delinquent filing, and the applicable limit of liability was that set forth in the last sentence of paragraph 9 (Full Reporting Clause).

9. The Court erred in failing to find and hold that under the terms of the policy the first report of values was not due until January 31, 1946, and not delinquent until 30 days thereafter, and therefore the report of values filed on February 26, 1946 complied with the policy terms.

10. The Court erred in finding and holding that the report of January 3, 1946 was a report under the new policy and limited plaintiffs' recovery to the sum of $1,936.92.

BENJAMIN J. GOODMAN
Attorney for Plaintiffs and Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 27, 1947. [74]

[Title of District Court and Cause]

ORDER FOR TRANSMISSION OF EXHIBITS

The Court being of the opinion, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, that the original exhibits herein should be inspected by the appellate court;

Now, Therefore, It Is Hereby Ordered that the Clerk of this Court is hereby authorized and directed to transmit to the Clerk of the Circuit Court of Appeals all of the original exhibits introduced in the above entitled cause, in lieu of copies thereof; the same to be transmitted at the same time as the remainder of the transcript of record is transmitted to said Court.

Dated: Aug. 27, 1947.

JACOB WEINBERGER
U. S. District Judge

[Endorsed]: Filed Aug. 27, 1947. [77]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 77, inclusive, contain full, true and correct copies of Complaint on Contract; Summons; Answer; Agreed Statement of Facts; Opinion; Findings of Fact and Conclusions of Law; Judgment; Substitution of Attorneys filed March 28, 1947; Motion for a New Trial and Motion to Open Judgment and Take Additional Testimony Pursuant to Rule 59; Affidavits of Benjamin J. Goodman and George Penney in Support of Motion for New Trial, etc.; Minute Order Entered June 2, 1947; Substitution of Attorneys filed June 20, 1947; Notice of Appeal; Cost Bond on Appeal; Statement of Points on Appeal; Designation of Record on Appeal and Order for Transmission of Exhibits which, together with copy of Reporter's Transcript of January 6 and June 2, 1947 and original Plaintiffs' Exhibits 1 and 2 and original Defendant's Exhibit A, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $19.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 2 day of October, A. D. 1947.

(Seal) EDMUND L. SMITH
Clerk

By Theodore Hocke
Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, January 6, 1947

Appearances:

For the Plaintiffs: George Penney, Esq., 939 Rowan Building, 458 South Spring Street, Los Angeles California.

For the Defendant: Hindman & Davis, By: E. Eugene Davis, Esq., 908 Consolidated Building, 607 South Hill Street, Los Angeles, California.

Los Angeles, California, Monday, January 6, 1947, 11:00 A. M.

The Court: I understand this is to be presented upon a stipulation of facts?

Mr. Penney: That is right, your Honor. We have filed our stipulation of facts. We will present it upon the stipulation of facts.

The contract was in force and effect at the time of the fire, I will ask that it be marked Exhibit A and I will offer it at the present time.

The Court: Any objections?

Mr. Davis: No objections on the policy.

The Clerk: That will be Exhibit 1.

Mr. Penney: Oh, I am sorry, Exhibit 1. Then we have our stipulation on the facts.

(Document handed to the Court.)

This is the policy which was in effect prior to the time of the—

The Court: Prior?

Mr. Penney: Yes, your Honor.

The Court: Are you offering that?

Mr. Penney: Yes, in accordance with the stipulation I have served upon opposing counsel, your Honor. My memorandum of authorities. I have these in duplicate at this time.

The Court: Have you a memorandum of authorities you wish [2*] to file?

Mr. Davis: Yes, your Honor. I didn't want to interrupt counsel. May I interrupt?

The Court: Yes.

Mr. Davis: There are a couple of points that we have not stipulated upon, that I did not feel like asking the plaintiff to stipulate to, and I wanted to put in a little testimony. However, if he is willing to stipulate to it I would like to make a statement of what I intend to prove by this witness:

That the defendant received these statements of value referred to and that they believed in them and acted upon them in issuing them the second policy, and that they used them in determining the underwriting for the second policy.

The Court: That would naturally follow, wouldn't it?

Mr. Penney: Yes, your Honor. I assume that would take place. If they were going to do anything like that I would want to have some stipulation, however, that the minimum premium here would pay for a certain amount of insurance; it would not be limited to the amount previously set forth.

The Court: From reading this I understand there is first an issue of fraud.

*Page number appearing at top of page of original Reporter's Transcript.

Mr. Davis: Yes, your Honor, it is an issue of concealment and misrepresentation.

The Court: And then the second is that the interpretation [3] of the provisional clause of your insurance policy?

Mr. Davis: That is correct.

The Court: Of course I have not read the stipulation of facts, but I presume the facts are stated in there as the amount of insurance and the reports are probably correct.

Mr. Penney: They are correct.

The Court: We are assuming that.

Mr. Penney: There is no question about that at all.

The Court: If there was fraud it might be a question whether the policy was not entirely void, is that correct?

Mr. Penney: That is correct.

The Court: All I can do, gentlemen, is to study these memoranda. But here is a thought that occurred to me: The plaintiff is claiming that they are taking advantage of their 30 day period of grace and made their report of the actual amount on hand. In other words, in this case they have reported either two or three thousand dollars each reporting period and had not made the report at the end of the month preceding the fire; that then after the fire they reported this 27 or 29 thousand dollars—I have forgotten the figures—so it is apparently the contention of the plaintiff that they could carry along and report an amount less than the actual inventory and take advantage of the 30 days, and then by making a report after the 30 day period get the full coverage.

Mr. Penney: No. [4]

The Court: Isn't that the effect of it?

Mr. Penney: No, your Honor. If this had occurred at that time under the old policy I would not raise any

question about it at all. It was my contention and the theory upon which this case was brought that the issuing of a new policy was a new contract of insurance and that it was not a renewal of the old contract of insurance. If this had happened under the old policy I would have advised my clients not to have done that at all. But our whole theory is that these are separate contracts of insurance and they are not continuing contracts at all.

The Court: Assuming that is true, I have been giving this some thought from the pleadings as to the exact picture. However, I think it would be a waste of time for me to attempt to discuss it until I have read the briefs and get your theories.

Mr. Penney: That is right.

Mr. Davis: Now may I state this, your Honor. As a matter of common knowledge and practice—and let Mr. Penney listen to me and if he agrees with me I won't have to call this witness—the practice in writing this type of insurance is when the risk is first presented there is a certificate of values and an estimate made and then the policy is issued and monthly reports are made. A month before the last month of the first policy an estimate of the provisional amount necessary to take [5] care of the risk is made, based upon these reports. Those estimates obviously cannot be made as of the last day of the month because they would not have any data to work on, to write a policy on the first of January, we will say; so they take their data up to the first ten months and then upon that date, based upon the reports submitted by the assured to the company, the insurance company decides upon its underwriting. It decides from that the provisional amount that will be necessary, based on the months, and that they collect their deposit premium. Following on from that the assured may report more or less.

Now in this case, and I think Mr. Penney will agree with me, at the conclusion of this first policy a statement was made to the assured setting up each month's report as the assured reported it. Then an average was made and it was determined from that average in this case that the assured had an average of $4,000.00 at risk. He had made a deposit premium of some $140.00—I have forgotten the exact amount. The difference between the deposit premium and the minimum premium of $100.00 was returned to him by the agent. It was accepted by him. I think he received it after the loss, but before any reports of different values were made to us. The compilation, based upon these averages, produced a premium of less than $50.00, but because there was a minimum premium provided the assured received back the amount over the minimum that had been [6] made as a deposit premium. Then that data is carried right on into the second policy. Now I can show by Mr. Rankin, who was the underwriter in this case, that this was a renewal policy in the sense the policy was renewed by his office on the data that they already had, and while it was in the form of a new policy it carried into it the information and data used in the old. All of those things I want to show to the Court. However, if Mr. Penney agrees they are correct I won't call the witness.

Mr. Penney: I think that is substantially correct, your Honor.

The Court: As I understand these provisional policies, for instance, if a man goes in and wants such a policy,—the purpose of the policy is to cover fluctuated inventories.

Mr. Davis: That is right.

The Court: He will say, for instance in one case, that his inventory is $2,000.00, or we will say $5,000.00; he will then make a deposit of a premium on the basis of $5,000.00; and then they take the average for the period. Is it ten months? Or is the average for the year taken? That is the way I understand it.

Mr. Davis: The ten months is the data for the renewal.

The Court: For the renewal?

Mr. Davis: But they take their average for the year in final compilation. [7]

The Court: For the 12 months?

Mr. Davis: Yes, your Honor.

The Court: Then they figure out the amount of insurance on a monthly basis. Then if the original deposit is insufficient the policyholder owes additional money.

Mr. Davis: That is right.

The Court: Or if there is an excess there is a refund?

Mr. Penney: That is correct, your Honor. In this particular case here the refund would be for the previous year, that is, any refund which they sent back in 1946.

The Court: That is true.

Mr. Penney: It would be for the calendar year 1945. Then when they figure their premium for 1946 they would take the report made under the new policy.

Mr. Davis: Under the old policy, you mean.

Mr. Penney: No, under the new policy.

The Court: In other words, they would take the experience under the old policy as the requirement for a deposit under the new?

Mr. Penney: That is right, and any refund goes back on the old policy.

The Court: Yes.

Mr. Penney: At the conclusion of the year 1946 they then would have to determine the premium to be paid under the policy which was in existence at the time of the fire. [8]

Mr. Davis: Mr. Penney, I notice you had a statement. May we show that to the Court?

Mr. Penney: Oh, sure.

Mr. Davis: That statement under the old policy, I have one, but it is pasted.

The Court: Has that been introduced in evidence?

Mr. Davis: No, your Honor, but I would like to introduce it. This is the statement rendered to the assured, the final statement, premium adjustment, which was rendered after the first policy had run its term and from which was computed the $44.00 return premium that the assured got. Is that right?

Mr. Penney: Yes, he got that.

Mr. Davis: May I offer this in evidence as Defendant's Exhibit A?

(The document was marked Defendant's Exhibit A.)

The Court: As I understand, it is your contention, Mr. Penney, that each year represents an independent

contract and has no relation to the old; and it is the contention of the defendant that they are tied in by reason of the experience of the previous year as a basis upon which the deposit is made for the next year.

Mr. Penney: That is correct, your Honor, but that is only for the minimum deposit premium.

The Court: That is correct, the minimum deposit.

Mr. Penney: And I think it is further stipulated— [9]

Mr. Davis: And it also to determine the limit of liability.

Mr. Penney: That is correct. You will also stipulate, will you not, Mr. Davis, that the minimum premium here would have covered approximately twice the average amount which was reported by the plaintiff in that policy which was in existence in 1945?

The Court: I have not read the statement of facts. It is hard for me to understand in reading the pleading an explanation of the reporting of really a nominal amount when the man actually had a stock on hand. In other words, it has the appearance on the face of it that the man was working either to pay a small amount of insurance and then if he had a fire he would jump in and collect a large amount.

Mr. Penney: If that had happened under the original policy, but your Honor we get into a situation here and find it happens quite frequently—this is off the record here—

(Further remarks of counsel omitted from the record.)

The Court: I understand the minimum, but if I remember that would have been an understatement.

Mr. Penney: That is right. There is no question about that.

The Court: If he would have gotten by with that for the year without a loss.

Mr. Penney: That is the chance he takes, that is right. [10]

The Court: I know, but if he had gotten by in the year without a loss he would have paid the minimum amount of insurance. However, where there was 30 days to file his statement, if he had a fire, in the meantime he could have filed a larger amount.

Mr. Penney: No, sir.

The Court: You are claiming 27/29ths of it in round numbers, are you not?

Mr. Penney: That is right.

The Court: And the defendant claims he is entitled to 2/27ths—

Mr. Davis: 2/29ths.

The Court: If the policy is not void under fraud.

Mr. Penney: I think they could raise that question at any time under the old policy. My theory here is just this: That under the new policy there it is the first report he had to make and that where the loss occurred under the new policy they cannot go back to the old policy and tie the old policy in to the new policy. That is our whole case. If the loss had occurred in 1945 he would not have

had any 30 day grace at that time because the policy does not provide that. The provision of the policy is that on the first report, and it is my contention they are separate contracts.

The Court: The policies are worded differently?

Mr. Penney: No, there is no difference, your Honor. [11]

The Court: There is no difference in the wording of the two policies?

Mr. Penney: No, they are both standard form policies.

The Court: Do you gentlemen desire to submit any answers to the points and authority submitted?

Mr. Davis: I think probably we both would, your Honor, because neither one of us have read the other's papers.

The Court: I will allow you 15 days to do that.

Mr. Davis: Do you stipulate to my statement, the one I made before, Mr. Penney?

Mr. Penney: Yes, I think that is correct. I think the Court will take judicial notice of his experience in matters of this kind.

Mr. Davis: I think it should be a matter of proof, but so long as you stipulate we will rest upon our stipulations.

Mr. Penney: That is satisfactory.

The Court: 15 days to file a reply brief.

[Endorsed]: Filed Aug. 27, 1947. [12]

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, June 2, 1947

Appearances:

For the Plaintiff: William H. Levit and Benjamin J. Goodman.

For the Defendant: George Penney.

Los Angeles, California, Monday, June 2, 1947, 10:30 A. M.

The Court: You may proceed.

The Clerk: Case No. 5814-BH-Civil, L. Wallace and others against World Fire and Marine Insurance Company.

Mr. Goodman: The plaintiff is ready, your Honor. If the court please, this is a motion for a new trial.

The Court: I have read your memorandum.

Mr. Goodman: I don't know that there is anything I can add to that unless your Honor cares to have oral argument at this time.

The Court: Not unless counsel desires to argue it. You have asked for a new trial and asked to introduce the notice. I feel if the notice is as you claim, I would have to deny any judgment because I think it admits one of two things. It either admits they failed to comply with the terms of the policy or your client is guilty of fraud.

Mr. Goodman: Well, we are prepared to take the circumstances whatever your Honor's ruling may be. But we do feel this, your Honor, that the case was tried with that report as really the basis of the case on both sides and

I think there must have been an inadvertence on both sides that the report was not presented to your Honor. If we are wrong on the facts or the law after the report is in we are prepared to take the consequences of that, but we feel it [2] should be admitted in evidence, at least to make the record clear.

The Court: This case was tried virtually on a stipulation of facts by competent attorneys and I see no reason why a motion for new trial should be granted.

Mr. Goodman: We do not expect to try the case over.

The Court: I am going to deny the motion for new trial.

Mr. Goodman: We merely want to get the report in the record.

The Court: The motion for a new trial will be denied.

(Whereupon, the above entitled matter was concluded.)

[Endorsed]: Filed Oct. 2, 1947. [3]

[Endorsed]: No. 11747. United States Circuit Court of Appeals for the Ninth Circuit. L. Wallace and E. B. Landry, a copartnership doing business as Fullerton Manufacturing Company, Appellants, vs. World Fire and Marine Insurance Company of Hartford, Connecticut, a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 3, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States in and for the Ninth Circuit

No. 11747

L, WALLACE and E. B. LANDRY, a co-partnership, doing business as FULLERTON MANUFACTURING CO.,

Appellants,

vs.

WORLD FIRE AND MARINE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation,

Appellee.

APPELLANTS' STATEMENT OF POINTS AND DESIGNATION OF RECORD

Now come L .Wallace and E. B. Landry, a co-partnership, doing business as Fullerton Manufacturing Co., appellants above named, and for their Statement of Points upon which they intend to rely in this appeal, adopt the Statement of Points filed by them in the United States District Court in connection with their Notice of Appeal and included in the transcript of record prepared and certified by the Clerk of said District Court.

Appellants designate the entire record herein to be printed.

BENJAMIN J. GOODMAN
Attorney for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 13, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause]

MOTION TO DISPENSE WITH PRINTING OF ORIGINAL EXHIBITS

Appellants hereby move the Court to consider the exhibits herein in their original form and dispense with the necessity of printing said exhibits on the following grounds which appear from the record herein:

1. The District Court made its order, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure that the original exhibits should be transmitted to this Court, and said exhibits are now in the custody of this Court.

2. That said exhibits consist of two identical standard form fire insurance policies which contain many lines of fine print and several endorsements; that only one endorsement is involved in this case and on this appeal; that appellants intend to print said endorsement in their Brief herein so that the same will be readily available to the Court.

3. That the cost of printing the record herein without said exhibits is approximately $260.00 and if said exhibits are included therein the additional cost by reason of said inclusion will be approximately $210.00.

4. That in preparing and filing their Designation of Record herein, appellants did not intend to request the printing of the exhibits.

Respectfully submitted,

BENJAMIN J. GOODMAN
Attorney for Appellants

ORDER DISPENSING WITH PRINTING OF EXHIBITS

Pursuant to the foregoing motion and good cause appearing therefor:

It is hereby ordered that the exhibits in the above cause shall be considered by the Court in their original form and the Clerk shall omit the same from the printed record herein.

Oct. 20, 1947.

WILLIAM DENMAN
Circuit Judge

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 20, 1947. Paul P. O'Brien, Clerk.